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No. 03-1180

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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This case presents the same government speech, commercial speech, and remedial questions as *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164, in the context of a substantially similar agricultural program. As explained in the petition and the reply in *Livestock Marketing*, those questions warrant this Courts review. There is no need, however, for the Court to receive full briefing and hear argument in two cases that present the same fundamental questions. The petition in this case should therefore be held pending the decision in *Livestock Marketing* and then disposed of as appropriate in light of that decision.

Respondents make essentially the same arguments against review as the respondents in *Livestock Marketing*. The government's reply brief in th t case fully responds to those arguments and that discussion will not be repeated here. Instead, this reply will briefly address respondent' principal objections to review and demonstrate why those arguments provide no basis for denying review. The reply also addresses respondents'

alternative contention that, if review is granted in *Livestock Marketing*, it should also be granted in this case.

1. Respondents contend that certiorari should be denied because there is no circuit split on whether generic advertising programs are constitutional under the government speech doctrine. Br. in Opp. 10-11. But the court of appeals in this case, like the court of appeals in *Livestock Marketing*, invalidated an important Act of Congress that has been in operation for more than 15 years. The invalidation of an Act of Congress is itself an independent reason for this Court to grant review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

The government speech question presented in this case and in *Livestock Marketing* is also one of exceptional and recurring importance. In *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001), the Court expressly left open the question whether a generic advertising program can be justified under the government speech doctrine. The resolution of that question will have a direct bearing on the constitutionality of a number of similar federal generic advertising programs. And, as the amicus brief of 30 States and Puerto Rico in *Livestock Marketing* attests, resolution of that issue will also affect the ability of States to adopt similar generic advertising programs. Thus, the question whether generic advertising programs are justified under the government speech doctrine clearly warrants this Court's review.

2. Respondents contend that the government should not be able to obtain a resolution of that important and recurring issue because it did not make a government speech argument in *Glickman* v. *Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997), and did not raise the argument in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), until the case reached this Court. Br. in

Opp. 11. That history has no bearing on the government's ability to raise the issue now. The government presented a government speech defense in the lower courts in both *Livestock Marketing* and this case, and the court of appeals in both cases resolved the issue on the merits, holding that generic advertising programs cannot be justified under the government speech doctrine. Because the question was both raised in, and passed upon by, the court of appeals in *Livestock Marketing* and this case, it is properly presented for this Court's review.

3. Respondents also argue that the government is largely raising a factual issue involving the extent to which the Secretary of Agriculture exercises oversight over generic advertising programs. Br. in Opp. 12; see *id.* at 17. That characterization of the government's position is incorrect. Here, as in *Livestock Marketing*, the government's argument that generic advertising is justified under the government speech doctrine is primarily based on the *legal* characteristics of the program. First, Congress itself has specified the content of the message to be conveyed under the Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. 4801 *et seq.*—that it is desirable to eat pork. 7 U.S.C. 4802(12) (defining "promotion" to mean action, including advertising, "present[ing] a favorable image for porcine animals, pork, or pork products to the public"). Second, Congress has selected that message in order to further important governmental purposes—to promote adequate nutrition and the national economy. 7 U.S.C. 4801(a)(3) and (4). Third, Congress has established an entity whose members are selected by the Secretary of Agriculture (the Pork Board) to help carry out some of the administrative responsibilities under the Act. 7 U.S.C. 4808. And fourth, Congress has en-

trusted the Secretary with the ultimate responsibility to ensure that Pork Act advertising campaigns advance the government's message and further governmental objectives. 7 U.S.C. 4808 (b)(1)(A), 4808(b)(2) (approval authority). Whatever the precise contours of the government speech doctrine, and regardless of the precise level of involvement of the Secretary of Agriculture in selecting particular advertising messages, those features in combination are more than sufficient to make Pork Act speech government speech as a matter of law.

4. Respondents alternatively contend that, if the Court grants certiorari in *Livestock Marketing*, it should also grant certiorari in this case. Br. in Opp. 12. Respondents claim that this Court should grant plenary review in both cases because the government "has not applied *[United Foods]* to other agricultural checkoff programs, but has instead launched a scorched earth government speech defense for all of them." *Id.* at 27. Respondents also assert that the government recommended that this Court hold this case pending the decision in *Livestock Marketing* "in order to delay the day when the last checkoff dollar is collected." *Id.* at 30. That assertion is groundless.

The Court in *United Foods* expressly left open the question whether generic advertising programs could be justified under the government speech doctrine. In the wake of that decision, the government's defense of generic advertising programs as permissible government speech did not reflect the failure to apply a controlling precedent of this Court; it reflected the fulfillment of the government's solemn duty to defend Acts of Congress. Nor did the government recommend that the petition in this case be held in order to delay the end of the Pork program. The government recommended that the Court hold this case pending the

decision in *Livestock Marketing* because the two cases present the same fundamental questions—whether generic advertising of agricultural products is permissible government speech, whether such generic advertising programs are constitutional when they satisfy the standards applicable to the regulation of commercial speech, and whether enjoining collections from those who do not object to assessments and for activities other than generic advertising is, in any event, an excessive remedy. It is the government's considered judgment that the Court would not be materially assisted by receiving two full rounds of briefing on those questions, or from hearing separate arguments concerning the two cases. Instead, as is customary when two cases raise the same basic issues, the Court should give plenary consideration to one of the cases and hold the other. And because the two cases present the same fundamental questions, the Court's decision in *Livestock Marketing* will presumably control—not delay—the disposition in this case.

* * * * *

For the foregoing reasons as well as those in the petition, the petition in this case should be held pending the decision in *Livestock Marketing* and then disposed of as appropriate in light of that decision. In the event that the Court concludes that it would benefit from briefing and argument in both cases, it should grant the petition in this case as well as in *Livestock Marketing* and consolidate the two cases for oral argument.

Respectfully submitted.

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